Supreme Court, U.S.
FILED
JAN 30 1997
CLERK

No. 96-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF SOUTH CAROLINA; DAVID M. BEASLEY, Governor of the State of South Carolina; DOUGLAS E. BRYANT, Commissioner of the South Carolina Department of Health and Environmental Control; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; SOUTH CAROLINA BOARD OF HEALTH AND ENVIRONMENTAL CONTROL,

Petitioners,

v.

ENVIRONMENTAL TECHNOLOGY COUNCIL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT GUILD
314 Pall Mall
Columbia, SC 29201
(803) 252-1419

JAMES S. CHANDLER, JR.*
S.C. ENVIRONMENTAL LAW PROJECT
Post Office Box 279
Pawleys Island, SC 29585
(803) 527-0078
Attorneys for the Respondents, Sierra Club, et al.
**Counsel of Record*

January 30, 1997

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Sierra Club, Energy Research Foundation, Citizens for Clean Air and Water, Environmentalists, Inc., and Citizens Asking for a Safe Environment (CASE) (hereinafter "Sierra Club") were the initial Appellants in this case when it was heard by the United States Court of Appeals for the Fourth Circuit. Sierra Club intervened in this case to support one of the challenged statutes and the challenged regulation. Sierra Club supports the Petition for Writ of Certiorari in this matter for the following reasons:

1. The first question presented is an important issue of federal law relating to the regulation of hazardous waste. The issue presented was identified but not addressed in the Court's opinion in *Chemical Waste Management v. Hunt*, 504 U.S. 334, 346 n.9 (1992): whether the RCRA consistency standard and federal approval under that standard displace the dormant Commerce Clause. *See also, C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 409-410 (1994) (O'Connor, J., concurring).

2. The second question presented — concerning the validity of South Carolina's neutral cap on disposal of hazardous waste by burial and the regulation requiring a demonstration of need for new treatment facilities — addresses the issues which led Sierra Club to intervene.

The neutral cap at issue is an amendment to reduce South Carolina's existing cap on the amount of hazardous waste that may be buried annually in permitted landfills — the original cap was 135,000 tons/year, and the amendment reduced the cap to 120,000 tons/year and then 110,000 tons/year. The District Court and Court of Appeals granted summary judgment concluding that the new cap is not evenhanded, and citing *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994), appeared to make and rely upon factual findings which are improper at the summary judgment stage. Sierra Club believes that the lower courts have misapplied this Court's *West Lynn* decision and erroneously granted summary judgment.

South Carolina's "needs regulation" simply requires an assessment of in-state need for hazardous waste treatment and disposal when permitting new treatment and disposal capacity. The regulation merely ensures that hazardous waste facilities bear a nexus to some hazardous waste generated within the state. It does nothing to prevent new permitted capacity from being devoted entirely to out of state waste. Again, the lower courts granted summary judgment with no factual record to support the conclusion that the regulation is discriminatory in its application.

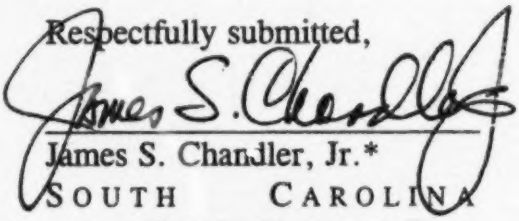
The in-state need requirement is in fact no different from the type of evenhanded, nondiscriminatory limitation on the amount of waste disposed of that does not discriminate on the basis of the waste's origin which is described with

approval in *Chemical Waste Management, supra, Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), and *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Neither the District Court nor the Fourth Circuit explained how the needs requirement is different from a neutral cap. This important issue warrants review by the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



James S. Chandler, Jr.*
SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT
Post Office Box 279
Pawleys Island, SC 29585
(803) 527-0078

ROBERT GUILD
314 Pall Mall
Columbia, SC 29201
(803) 252-1419
Attorneys for the Respondents, Sierra Club, et al.
**Counsel of Record*

January 30, 1997